United States v. Albino

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MEMORANDUM and ORDER[1]

Defendants Fred Albino ("Freddy"), Jose Hernandez ("Poochie") and Manuel Hernandez ("Manny") (collectively "Defendants") were convicted on October 18, 2005 of conspiring to possess with the intent to distribute and conspiring to distribute 500 grams or more but less than 5 kilograms of cocaine in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B)(ii)(II) and 846. These convictions carry with them a mandatory minimum prison sentence of five years. Manny was also convicted on October 18, 2005 of using a telephone to aid in such possession and in the distribution of cocaine in violation of 21 U.S.C. § 843(b) and 18 U.S.C. §2, neither of which provides for a mandatory minimum sentence. Defendants have yet to be sentenced, but are currently incarcerated pursuant to the October 18 guilty verdict. On November 18, 2005 Defendants submitted motions for judgments of acquittal or, in the alternative, for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure ("FRCrP").[2] Defendants claim that (1) there was insufficient evidence to find Defendants guilty, (2) the verdict was inconsistent with the indictment and (3) the prosecution committed a Brady violation by allegedly not disclosing all materials pertaining to the mental health of Alvin Ozoria, a government witness. For the reasons set forth below, Defendants' motions will be denied.

This drug distribution and conspiracy prosecution was originally brought against sixteen co-conspirators - Defendants and Frank Alvarez, Ozoria, Edgar Rodriguez, Jimmy Rivera, Emilio Rodriguez, Anthony Berrios, Oscar Vargas, Joe Coffman, Reginald Marvin, Jim G. Rivera, Jr., Carlos Rodriguez, Martin Santiago and Pablo Vega. All but Freddy, Poochie and Manny have pled. The trial commenced on October 3, 2005 and, after deliberating for nearly three days, the jury issued its verdict on October 18, 2005.

The pending motions turn on whether there was sufficient evidence from which a jury could conclude that Defendants were members of a conspiracy to possess and distribute 500 grams or more of cocaine and on whether the verdict would have been different had there been a less confusing verdict sheet or had Defendants known of Ozoria's mental illnesses prior to trial. The Court will recite the facts, in the light most favorable to the government, as presented during trial.

From October 1999 to May 2001, the sixteen co-conspirators conspired to acquire cocaine from one another and then distribute it to one another and to others. In Spring 2001, the Federal Bureau of Investigation ("FBI") and other agencies conducted Title III electronic surveillance of two cellular telephones belonging to Edgar Rodriguez. The intercepted calls demonstrated that Ozoria and Alvarez were supplying cocaine, either directly or through an intermediary, to the co-conspirators,

including Manny and Freddy. This is a dry conspiracy case where no cocaine was seized. The government built its case on thirty telephone conversations that were intercepted by the FBI, testimony of several of the co-conspirators - viz., Ozoria, Edgar Rodriguez, Jimmy Rivera and Emilio Rodriguez - and physical evidence of materials seized by FBI agents that, coupled with the testimonies of the co-conspirators, FBI agents and other witnesses - viz., Nelda Rodriguez and Rene Gil -, define and detail the activities of the conspiracy.

The conspiracy was originated by Ozoria and Alvarez, with Ozoria as the leader and Alvarez as the second-in-command. Ozoria admitted during his testimony that he was a known drug dealer and that he had been engaged in illicit activities for years. Together, Ozoria and Alvarez obtained cocaine from New York City and transported it in "trap" compartments of several automobiles driven by some of the co-conspirators - including Freddy - from New York City to Buffalo. There were several cars involved in transporting the cocaine and the money collected from selling the cocaine. Each car had a hidden compartment in which up to seven kilograms of cocaine could be transported without detection. Ozoria testified that, between 1999 and 2001, he sold approximately 15 kilograms of cocaine per month and physical evidence in the form of a drug ledger was presented that at least 11 kilograms of cocaine had been transported to and sold in Buffalo. In addition, the government presented physical evidence of organizers detailing the activities of the conspiracy that included Manny, Poochie and Freddy and witness testimony of meetings at which one or all of the Defendants were present and when cocaine transactions or the conspiracy were discussed. Finally, it was established at trial that one kilogram of pure cocaine would sell for $22,000 to $30,000 and one kilogram of cut cocaine would sell for $12,000 to $15,000.

Ozoria testified that Freddy became involved in the drug dealing business in 1999. Ozoria, Edgar Rodriguez, Emilio Rodriguez and Jimmy Rivera testified as to Freddy's involvement in the conspiracy and Gil testified that Freddy had sold him a total of almost 1.5 kilograms of cocaine as a result of several 8 and 15 ounce transactions. Freddy was responsible for the maintenance of the cars used in transporting the cocaine and money received for the cocaine and was a trusted courier for the conspiracy. On March 9, 2000 Freddy had been stopped in Horseheads, N.Y. for speeding. In his car, the police officer found $13,000 cash and Ozoria's and Alvarez's drug ledger that recorded the transactions of the conspiracy's customers, the amount of cocaine sold to each customer and the amount paid and owed by each customer. This ledger highlighted the scale of the conspiracy and that at least 11 kilograms of cocaine had been transported to and/or distributed in Buffalo. The other members of the conspiracy - including Manny - were aware of this ledger and that it had been taken by the police.

The government introduced four telephone conversations that involved Manny. The recordings combined with testimony indicate that the conversations were about cocaine and the conspiracy - to wit, the quality of the cocaine Manny bought from Ozoria, the cars used in the transportation of the cocaine and the equipment used in the "cutting" of the cocaine. Ozoria testified that he had sold cocaine to Manny many times, initially selling him 250 grams per transaction and ultimately selling

him up to one kilogram per transaction. Edgar Rodriguez, Emilio Rodriguez and Jimmy Rivera also testified to Manny's involvement in the conspiracy, both as a manager and as a drug dealer.

Poochie had originally been involved in a different conspiracy that ran out of cocaine. He then got involved with Ozoria. Nelda Rodriguez and Rene Gil testified that Poochie got cocaine from Ozoria and sold it to them. Gil testified that Poochie sold about 8 ounces of cocaine to him on a weekly basis from May 2000 to February 2001, totaling nearly 7 kilograms of cocaine. Nelda Rodriguez also testified that Poochie would get cocaine from Ozoria, some of which she would sell and then give Poochie the proceeds.

Defendants were indicted on May 4, 2001 for conspiring to possess and distribute five kilograms or more of cocaine. The trial took nearly two weeks and the jury was instructed and charged on October 14, 2005. Count 1 of the verdict sheet stated:

"[Defendant]

Knowingly, willfully and unlawfully conspired to possess with the intent to distribute, and to distribute, five kilograms or more of cocaine.

[Defendant] Not Guilty ___ Guilty ___

If you find the defendant guilty, proceed to the next question.

We the jury find that the amount of the mixture or substance containing cocaine was:

(mark only one) less than 500 grams ___ 500 grams or more, but less than 5 kilograms ___ 5 kilograms or more ___"

No party objected to the verdict sheet until approximately 4:00 p.m. on October 17, 2005.

During its three-day deliberation, the jury re-listened to several of the telephone conversations and to Ozoria's testimony. Ozoria was one of the government's key witnesses, as he had been the leader of the conspiracy and had had dealings with all three Defendants. On cross-examination, defense attorneys asked Ozoria if he had mental or emotional problems and, in particular, if he had been treated for schizophrenia. Throughout cross-examination, it became apparent that Ozoria had rather serious mental problems. In particular, he admitted that, as a result of schizophrenia, he heard voices, he thought the television and radio were speaking to him, he saw things that were not really happening, he would confuse reality and he was paranoid and delusional. He had been placed in an insane asylum for two months in 1995 or 1996 and had been placed in a straight jacket. He had been prescribed medications for his schizophrenia, but was not diligent about taking such. He also testified that he would use about one ounce of cocaine each day, which only exacerbated his mental

problems. At the end of Ozoria's cross-examination, defense counsel claimed that discovery of Ozoria's mental health problems was "pure luck", to which the government responded that Defendants had been alerted to Ozoria's problems via a September 6, 2005 letter. In this letter, the government stated that Ozoria had assaulted a probation officer and that

"Ozoria suffers from one or more psychological problems. However, [the government] does not have any records relating to these problems. Moreover, these problems *** do not appear to affect [Ozoria's] ability to recall, and it appears that they did not impair his 'ability to perceive' the 'events' *** about which he will be testifying [at trial] when he observed those events."

The jury also asked the Court if they had to "be in total agreement on the amount of cocaine involved for each defendant". (Jury Question, October 17, 2005 at 3:27 p.m.) The Court answered:

"Count 1 charges the defendants with conspiring to distribute and to possess with intent to distribute 5 kilograms of more of cocaine.

"A guilty verdict may be returned as long as you find that the particular defendant conspired to distribute or conspired to possess with intent to distribute or *** possessed with intent to distribute or distributed cocaine in any amount, as long as you unanimously agree that *** Count 1 relates to a measurable amount of cocaine.

"However, you will note that the verdict form requires that, in the event you find a defendant 'guilty' of Count 1, you must determine whether the weight of that mixture or substance of cocaine involved in this count, as it pertains to that defendant was a certain amount. *** Specifically, should you determine that the conspiracy charge in Count 1 involved a mixture or a substance containing cocaine, you must determine whether the weight of that mixture or substance was 5 kilograms or more, or if it was 500 grams or more, or if it was less than 500 grams.

"Keep in mind that, in making the findings as to the weight in Count 1, it's the entire weight of the mixture or substance that controls. If you find that the mixture or substance you must consider in your deliberations on Count 1 contains some amount of cocaine, the fact that mixture or substance was less than one hundred percent pure, or was adulterated or contained cut, is not relevant to your verdict as to the weight and should not be considered by you.

"You must be unanimous as to your verdict of 'guilty' or 'not guilty' for each defendant. Only if you find a particular defendant guilty must you find an amount and you must be unanimous as to that finding. You do not need to find the same amount for each defendant. Remember your verdicts, both as to 'guilty' and 'not guilty' and as to the amounts, must be unanimous and beyond a reasonable doubt."

All attorneys agreed to this answer except Jeffery A. Lazroe, Esq.,[3] attorney for Poochie. The jury

found all three Defendants guilty of Count One for possessing 500 grams or more but less than 5 kilograms of cocaine.[4]

Defendants move for a judgment of acquittal pursuant to FRCvP 29(c) and, in the alternative, for a new trial pursuant to FRCvP 33. The Court, in addressing a motion for a judgment of acquittal notwithstanding the verdict, must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Defendants, in challenging the sufficiency of the evidence, "bear[] a heavy burden." United States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004) (citation and internal quotations omitted). "[A] court may enter a judgment of acquittal only if the evidence that [Defendants] committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999) (citation and internal quotations omitted).

In applying these principles, the Court must "review all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." United States v. Walker, 191 F.3d 326, 333 (2d Cir. 1999) (citation and internal quotations omitted). It is settled that "[FRCvP] 29(c) does not provide the trial court with an opportunity to substitute its own determination of *** the weight of the evidence and the reasonable inferences to be drawn for that of the jury." Guadagna, at 129 (citation and internal quotations omitted). It is the jury's role, not that of the court, "to choose among competing inferences" that may be drawn from the evidence. United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995). The traditional deference accorded to a jury's verdict "is especially important when reviewing a conviction for conspiracy *** because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." United States v. Pitre, 960 F.2d 1112,1121 (2d Cir. 1992) (citation omitted). "The existence of and participation in a conspiracy may be established through circumstantial evidence *** from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." Ibid (citation and internal quotations omitted). "[O]nce a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." Ibid (citation and quotations omitted).

Defendants were convicted of conspiring to possess with the intent to and conspiring to distribute more than 500 grams and less than 5 kilograms of cocaine. The jury determined the amount of cocaine as an element of the crime and found Defendants guilty of a crime less than that for which they were indicted. See Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Thomas, 274 F.3d 655 (2d Cir. 2001). Defendants contend that acquittal is appropriate here because there was not sufficient evidence from which to determine the amount of cocaine and that the weight of cocaine charged for each Defendant should be specific to that Defendant and not to the entire conspiracy. Each co-conspirator is not only responsible for the cocaine that he conspired to possess and/or

distribute, but also for the cocaine his co-conspirators conspired to import, provided that he knew of his co-conspirator's illicit activities or the activities were reasonably foreseeable by him. United States v. Jackson, 335 F.3d 170, 181 (2d Cir. 2003). An individual charged with a narcotics conspiracy in which he may have played only a small part can be charged with conspiracy for the entire operation, so long as he is "sentenced for conduct that was reasonably foreseeable by [him]." United States v. Martinez, 987 F.2d 920, 924 (2d Cir. 1993); see also 21 U.S.C. §846.

In this case, the sole question upon the FRCvP 29(c) motion is whether, applying the foregoing principles, the evidence was sufficient to support the jury's finding that Defendants engaged in a conspiracy to possess with the intent to distribute and in a conspiracy to distribute 500 grams or more of cocaine. Viewing the evidence in the light most favorable to the government, there is sufficient evidence for a rational factfinder to determine that each Defendant conspired to possess at least 500 grams of cocaine. Witnesses testified that Poochie, Freddy and Manny possessed at least 500 grams of cocaine on several occasions and sold far more than that in total. Witnesses also testified that Freddy was responsible for maintaining the vehicles, which had "trap" compartments that could hold several kilograms of cocaine and Freddy was found in possession of $13,000 - the value of approximately 1 kilogram of cut cocaine or 500 grams of pure cocaine - and had records of a scheme to distribute at least 11 kilograms of cocaine. Testimony and recordings indicated that Manny was aware of the conspiracy and made attempts to further its objectives. The jury also could have reasonably extrapolated the amounts of cocaine involved from the amounts of money exchanged or carried by Defendants. Moreover, the evidence presented at trial allowed for a finding that all three Defendants were aware of the magnitude of the conspiracy and knew that they were part of a larger cocaine selling and transporting scheme operated by Ozoria. Defendants cannot meet their heavy burden in overturning a jury verdict and thus, their motions for an acquittal notwithstanding the verdict will be denied.

Defendants, in the alternative, seek a new trial on the basis that the verdict was inconsistent and that the government committed a Brady violation by allegedly not disclosing all material information about Ozoria's mental health. Neither allegation is sufficient to warrant a new trial. "[FRCrP] 33 confers broad discretion upon the court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992); FRCvP 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interests of justice so requires."). Defendants seeking a new trial bear the burden of demonstrating the "essential unfairness" of the original trial. United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956). In exercising its discretion, the court is entitled to weigh the evidence and, in so doing, to evaluate the credibility of witnesses. Sanchez, at 1413. New trials are "disfavored" in the Second Circuit and should be granted only in exceptional circumstances. United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995). "The test is whether 'it would be a manifest injustice to let the guilty verdict[s] stand.'" Sanchez, at 1414 (citation omitted).

Defendants claim that the verdict sheet was irreconcilable.[5] The verdict sheet did contain an "error"

in that the jury found Defendants guilty of that which was stated in the indictment - for conspiring to possess and distribute 5 kilograms or more of cocaine -, but then found Defendants guilty of conspiring to possess and distribute 500 grams or more but less than 5 kilograms of cocaine. Clearly, an inconsistency exists, but such is not prejudicial to Defendants; if anything, it benefits Defendants. First, the Court's response to the jury's question regarding the amount of cocaine clarified any perceived confusion. The Court instructed the jury that the determination of guilt is separate from that of amount of cocaine and that each should be determined beyond a reasonable doubt as to each Defendant. See United States v. Joyner, 313 F.3d 40, 48 (2d Cir. 2002) ("The jury instructions and the verdict sheet ameliorated any prejudice created by the errors in the indictment."). The Second Circuit in Joyner found that the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the jury was instructed that it had to agree unanimously on the elements and offenses. Ibid. Similarly here, the jury was instructed that it had to unanimously agree beyond a reasonable doubt as to the guilt or innocence of each Defendant and, if a Defendant was unanimously found guilty, it had to unanimously agree beyond a reasonable doubt as to the amount of cocaine for which such Defendant is guilty of conspiring to possess and distribute.

Second, Defendants do not show how the trial was unfair or how this error resulted in a manifest injustice. It is well established that drug quantity is an element of 21 U.S.C. §841, the statutory drug quantity has to be proved to a jury and the jury is entitled to convict on a lesser-included offense - such as a smaller amount of drugs - from that which is charged in the indictment. United States v. Gonzalez, 420 F.3d 111, 124 (2d Cir. 2005); United States v. Arroyo, 2002 U.S. App. LEXIS 2640, at *7 (2d Cir. 2002); United States v. Thomas, 274 F.3d 655, 663-664 (2d Cir. 2001); see generally Apprendi v. New Jersey, 530 U.S. 466 (2000). In the instant case, the drug quantity was proved to the jury and the jury elected to convict Defendants of a lesser-included offense than that charged in the indictment. No injustice occurred. See, e.g., Arroyo, at *7-*8 (dismissing the defendants' claim that they were effectively convicted of a crime different from that charged in the indictment because the jury convicted the defendants of a lesser-included offense and thus there was no harm to fairness or justice). Defendants cannot meet - nor do they attempt to - their burden of showing the unfair impact that the verdict sheet had on the outcome of the trial. Finally, in weighing the evidence presented at trial, the Court finds sufficient evidence - as stated supra - that the amount of cocaine each Defendant conspired to possess and distribute exceeded 500 grams.

Turning to Defendants' last argument regarding the alleged Brady violation, the government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment, Brady v. Maryland, 373 U.S. 83, 87 (1963), and if it could be used to impeach government witnesses. Giglio v. United States, 405 U.S. 150, 154 (1972).[6] There are three components of a Brady violation: (1) "[t]he material evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) the "evidence must have been suppressed by the [government], either willfully or inadvertently;" and (3) the accused must have been prejudiced as a result. United States v. Madori, 419 F.3d 159, 169 (2d Cir. 2005) (citing Strickler v. Greene, 527 U.S. 263, 281-282 (1999)) (internal quotations omitted). Although the evidence here is impeaching and assuming arguendo that the

government did not disclose information that it had in its possession or was under a duty to attain, the evidence itself was not material and thus the non-disclosure offends neither Brady nor Giglio.

Materiality or prejudice, for Brady and Giglio purposes, is established "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987). "A 'reasonable probability' is a probability 'sufficient to undermine confidence in the outcome.'" Ibid (citation omitted); see also Kyles v. Whitley, 514 U.S. 419, 435 (1995) (finding that evidence is material if it would have "put the whole case in such a different light as to undermine confidence in the verdict"). In the instant case, Defendants do not claim and cannot show how, if at all, disclosure would have altered the verdict.

The court "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." United Sates v. LeRoy, 687 F.2d 610, 616 (2d Cir. 1982). "It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." Sanchez, at 1414 (finding that, to be rejected by the court, the jury's evaluation must be "patently incredible or def[y] physical realities"). Even with such a finding, however, a new trial is not warranted unless "it would be a manifest injustice to let the guilty verdict stand." Ibid (citation omitted). No such exceptional circumstance exists here and, even if such did exist, allowing the guilty verdict to stand would not result in injustice. First, the jury was provided with ample evidence to assess Ozoria's credibility both during his testimony and during the testimony of other witnesses. The jury became aware of Ozoria's mental health problems during defense attorneys' cross-examination and the deliberating jury listened to Ozoria's testimony twice. Second, there was sufficient evidence for the jury to convict Defendants without giving Ozoria's testimony much, if any, weight. Finally, Defendants simply claim that they should have been provided this information without explaining how their cross-examination of Ozoria or the result in the case would have differed had they received the information. As such, allowing the guilty verdict to stand would not result in manifest injustice and the Court will not usurp the jury's role of determining the facts and accessing the credibility of witnesses.

Accordingly, it is hereby ORDERED that Defendants' motions for a judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial are denied.

1. This decision may be cited in whole or in any part.

2. In their motion papers, Defendants did not cite FRCvP 33, but the Court, in the interests of justice, will overlook Defendants' attorneys' rather substantial oversight.

3. Lazroe, on December 22, 2005, was suspended for six months by the Grievance Committee for violations of the Disciplinary Rules of the Code of Professional Responsibility. In re Jeffrey A. Lazroe, 2005 WL 3509429 (N.Y. 4th Dept. 2005). The Court does not find that Lazroe's prior misconduct had or will have an impact on this case.

4. The jury found Defendants not guilty of Counts 2 through 5 and found Manny guilty of Count 6. For the purpose of the pending motions, however, these portions of the verdict are not relevant.

5. Defendants' objections to the verdict sheet are not timely. They had an opportunity to review the verdict sheet prior to the commencement of the jury's deliberations and no objections were raised. Only after nearly two days of deliberations did Poochie's attorney object and the other two defense attorneys withheld any objections until just before the jury reached its verdict on the third day of deliberations. The untimeliness of Defendants' objections to the verdict sheet will not be a factor in the Court's analysis; however, the Court does note that, if the verdict sheet was so clearly confusing and/or irreconcilable, the many eyes that reviewed the verdict sheet prior to the jury receiving it would have noticed such.

6. Defendants' attorneys do not cite Giglio, although clearly the information regarding Ozoria's mental health does not pertain to exculpatory information but to information relevant to the impeachment of a government witness. Again, the Court will overlook this oversight.